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**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515-4320**

June 17, 2008

Commissioners Of The Election Assistance Commission  
Election Assistance Commission  
1225 New York Ave NW, Suite 1100  
Washington, D.C. 20005-6400

COMMITTEE ON  
ENERGY AND COMMERCE  
SUBCOMMITTEE ON COMMERCE, TRADE, AND  
CONSUMER PROTECTION  
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CHAIR OF THE CONGRESSIONAL HISPANIC  
CAUCUS CIVIL RIGHTS TASK FORCE  
2ND VICE CHAIR  
CONGRESSIONAL HISPANIC CAUCUS  
SENIOR WHIP

Dear Commissioners:

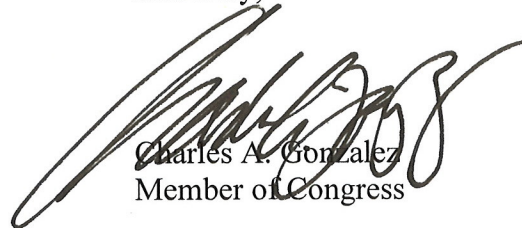
In conversation with Commissioner Hunter after your public meeting of April 30<sup>th</sup>, she said that she would welcome an outside review of the proposed Advisory 07-003-A and the Election Assistance Commission's role and authority under both the Help America Vote Act and OMB Circular A-102 with respect to the Maintenance of Effort requirements contained in HAVA and the activities of sub-state governments. After further examination of both, my office enlisted the Congressional Research Service to respond to two broad questions

- 1) Does HAVA make clear the definition of a State in regard to EAC and HAVA's Maintenance of Effort requirements? If not, is EAC authorized to interpret that language for itself, or would this constitute an "overreach [of] its statutory authority"? Has EAC previously established any standard for its oversight of funding at the sub-state, *e.g.*, county, level?
- 2) Does OMB Circular A-102 apply to the EAC in its oversight of funds under HAVA? If so, what requirements does the circular place on EAC's oversight or distribution of funds or on the recipients or users of those funds?

I am pleased to be able to present the enclosed report from CRS detailing their findings. I hope that you will find it informative and instructive.

I thank you again for your service and send my good wishes for your upcoming meeting of this Thursday.

Sincerely,



Charles A. Gonzalez  
Member of Congress

CAG: cr  
/Enclosure



## ***Memorandum***

June 12, 2008

**TO:** Honorable Charles A. Gonzalez  
Attention: Conrad Risher

**FROM:** Kathleen S. Swendiman  
Legislative Attorney  
American Law Division

**SUBJECT:** Legal Analysis of Proposed Changes to Maintenance of Effort Requirements for Grants Under Title II of the Help America Vote Act of 2002

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This responds to your request for an analysis of certain legal issues regarding proposed changes to Advisory 07-003-A, issued by the U.S. Election Assistance Commission (EAC) on January 18, 2005. This Advisory sets out the EAC policy on maintenance of effort (MOE) for grants administered by the EAC under Section 251 of the Help America Vote Act of 2002 (HAVA).<sup>1</sup>

### **Maintenance of Effort Under the Help America Vote Act**

HAVA created the Election Assistance Commission, a new federal agency, and gave the EAC various duties including providing grants to states under Title II to meet election administration requirements established by the Act. A state is eligible for grants under Section 252 of HAVA in a fiscal year if the chief executive officer of the state, or designee, certifies that the state is in compliance with certain requirements.<sup>2</sup> These requirements include filing with the EAC a state plan meeting the criteria in section 254 of the Act.<sup>3</sup> One of the state plan criteria is a description of:

(A)(7) How the State, in using the requirements payment, will maintain the expenditures of the State for activities funded by the payment at a level that is not less than the level of such expenditures maintained by the State for the fiscal year ending prior to November 2000.

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<sup>1</sup> P.L.107-252, 42 U.S.C. 15301 *et seq.*

<sup>2</sup> 42 U.S.C. § 15403. These grants are referred to as “requirements payments” under Title II of HAVA.

<sup>3</sup> 42 U.S.C. § 15404.

Maintenance of effort requirements are designed to ensure that federal payments supplement rather than supplant state expenditures in a particular area or for a particular project. In this case, the baseline level of state expenditures is that which the state expended in the fiscal year ending prior to November 2000. Each state must adhere to this MOE requirement as a condition for receiving a HAVA grant under section 252 by maintaining the baseline level of expenditures. If a state fails to adhere to this requirement it would no longer be eligible for a HAVA grant or it may have current funding suspended or recalled.

## Interpretation Issues Regarding the MOE Requirement

The calculation of the baseline level of state expenditures from 2000 is very important because it determines the level of expenditures states must meet in order to be eligible for grants under Title II of HAVA. Several questions may be raised as to how this section should be implemented: what kinds of “expenditures” must be included in calculating the state’s baseline level, whether the MOE requirement applies to every year since 2000 or only years in which the states receive HAVA funding, whether states must include county or local election-related expenditures in their baseline calculation, and if so, who is responsible for MOE in later years, the state as a whole, or the state and local governments individually? These are all interpretive questions which the EAC may address as matters of policy. In September, 2007, the EAC addressed the issue of whether local government expenditures must be included in calculating a state’s baseline level of election-related funding in 2000. EAC Advisory 07-003-A stated that “(b)ecause the intent of the MOE requirement is to prevent a State from replacing its own funding with Federal funding, expenditures at the State, county, and where appropriate, the local level must be considered. In other words, a State, county or local government *may not* replace or supplant its prior level of funding with Federal dollars.”<sup>4</sup>

A related HAVA provision has also been the subject of interpretation by the EAC. Section 253(b)(5) of HAVA<sup>5</sup> imposes a 5% matching requirement on the states in order for the states to receive requirements payments grants under Title II of HAVA. EAC Advisory 05-001, issued in January, 2005, provides that “(a) State may use funds that are set aside by county or local governments and maintained under the control of those governments as their matching funds for purposes of receiving Requirements Payments.”

The EAC advisories regarding MOE and matching funds both involve interpretations of the term “state” as used in Title II of HAVA. The underlying issue addressed by both of these advisories is whether Congress intended expenditures of a state under the MOE advisory or appropriated funds of a state under the matching funds advisory to mean expenditures or funding from just the state legislature, or whether Congress included, or intended to include, expenditures or funding from county or other local government sources. In other words, does the term “state” encompass all levels of political subdivisions. The only definition of “state” in HAVA does not address this issue. Section 901 of HAVA defines “state” as including the following jurisdictions: “In this Act, the term “State” includes the District of Columbia, the Commonwealth of Puerto, Guam, American Samoa, and the United

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<sup>4</sup> EAC Advisory 07-003-A - Maintenance of Effort Funding, response to question 1.

<sup>5</sup> 42 U.S.C. § 15403(b)(5).

States Virgin Islands.”<sup>6</sup> This definition lists the entities which will be considered states for purposes of HAVA, but it does not clarify what levels of government may or must be included as sources of expenditures or funding when the term “state” is used in the statute. Depending upon the context, Congress may have intended that only funds appropriated by the state legislature be included, or Congress may have intended that local government sources of funding be included along with state legislature funding. Either way, Congress did not make itself clear on this point. In addition, Congress does not appear to have provided any legislative history on this question, leaving to the EAC the task of making this determination as it implements title II of HAVA.

## Standard of Review by the Courts for Administrative Actions

As a general rule, courts defer to agency policy decisions since federal agencies have greater expertise in assessing and responding to technical complexities involved in running federal programs. In *Chevron v. Natural Resources Defense Council (Chevron)*,<sup>7</sup> the Supreme Court established a two-part test for judicial review of agency statutory interpretations. First, a reviewing court will determine “whether Congress has directly spoken to the precise question at issue.”<sup>8</sup> In the event that Congress has not unequivocally addressed the issue, a reviewing court must respect an agency’s interpretation, so long as it is permissible.<sup>9</sup> Judges are not experts in technical fields, and are not part of either political branch of the government, while agencies, as part of the executive branch, appropriately make “policy choices - resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”<sup>10</sup>

Essentially, if the statute is silent or ambiguous, the court’s inquiry must focus on whether the agency’s action is based on a permissible construction of the statute. This is an important point, because *Chevron* does not stand for the proposition that the agency has to construe the statute in the most logical manner, or that the court has to even agree with the agency. Instead, courts must respect a reasonable interpretation, given that Congress has delegated the responsibility for administering the particular program in question to the agency.

Congress, in HAVA, did not specify whether state expenditures or state funds may or must include funds from political subdivisions. Congress used the term state in a number of provisions in which it is not clear whether county and local government sources of funds should be included. This is particularly true for the MOE requirement which requires the state to describe “(h)ow the State, in using the requirements payment, will maintain the expenditures of the State...,”<sup>11</sup> and for the matching funds requirement which requires that “(t)he state has appropriated funds for carrying out the activities for which the requirements

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<sup>6</sup> 42 U.S.C. § 15541.

<sup>7</sup> 467 U.S. 837 (1984).

<sup>8</sup> Id. at 842.

<sup>9</sup> See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

<sup>10</sup> *Chevron*, 467 U.S. at 865.

<sup>11</sup> Section 254 of HAVA, 42 U.S.C. § 15404(a)(7).

payment is made in an amount equal to 5 percent of the total amount...”<sup>12</sup> Reasonable arguments may be made on both sides of this issue for inclusion/exclusion of local funds. Given the deference courts generally accord agency interpretations of ambiguities in statutes, the EAC has considerable latitude to decide whether or not local funding should be included under either the MOE or the matching fund provisions of HAVA. The current EAC guidance interprets both of these provisions as including county and local funds. Under EAC Advisory 07-003-A, states must include county and local expenditures in meeting the MOE requirement.<sup>13</sup> Under EAC Advisory 05-001, the EAC has interpreted the matching fund requirement as permitting the states to use funds from county or local governments to meet the 5% matching fund requirement.

## **Proposed Modifications of EAC Advisory 07-003-A Regarding MOE Requirements**

**The Baseline MOE Calculation.** It is our understanding that the EAC is considering a proposal to modify EAC Advisory 07-003-A to provide that counties and local governments not be required to comply with MOE requirements. As the EAC considers this proposal, it may be useful to look at the issues raised by this proposal in two parts, first the requirement for calculating the baseline level of expenditures prior to 2000, and second the effect of the MOE requirement on sub-grants to political subdivisions of the states.

With regard to the baseline calculation for determining the state’s MOE requirement, the EAC could take one of three possible positions: allow the states to decide whether or not to include local expenditures in their baseline MOE calculation, require the states to include any local expenditures from the fiscal year prior to 2000 in their baseline MOE calculation, or provide that only expenditures made on the state level be included in the baseline MOE calculation. The EAC could support any of these positions with legal and policy rationales.

**Application of MOE Requirement to Sub-Grantees.** Different issues arise with regard to the question of whether the MOE applies to sub-grants to political subdivisions of the states, regardless of the position the EAC takes on the calculation of the state’s baseline MOE level. Maintenance of effort is a condition for the receipt of funds by states under title II of HAVA. The maintenance of effort requirement does not affect the amount or actual use of funds a state receives in a given year, but it does affect whether or not a state is eligible to receive a grant. MOE is a condition for receipt of a HAVA grant imposed on the states through the State Plan requirements set forth in Section 254 of the statute.<sup>14</sup> In addition, if a state receives a HAVA grant and it is determined that the state has not been meeting its MOE requirement, the grant may be suspended and future funding denied.

There are two arguments that support the conclusion that when a state provides a sub-grant to a political subdivision of the state under title II of HAVA, that the MOE requirement “passes through” to the sub-grantee. The first argument stems from a reading of sections

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<sup>12</sup> Section 253 of HAVA, 42 U.S.C. § 15403(b)(5).

<sup>13</sup> Prior to issuance of this guidance, it appears that the EAC left the inclusion or non-inclusion of local expenditures in meeting the MOE requirement up to the states.

<sup>14</sup> 42 U.S.C. § 15404.

254(a)(7) and (a)(8) of HAVA.<sup>15</sup> The first section imposes the MOE requirement on the states as part of the State Plan. The second provision requires the states to hold units of local government accountable for complying with the provisions of the State Plan. The State Plan must contain a description of:

How the State will adopt performance goals and measures that will be used by the State to determine its success and the success of units of local government in the State in carrying out the plan,...

Under this section, units of local government are expected to carry out the State Plan, which includes a MOE requirement. Imposing a MOE requirement on localities as they expend HAVA funds is arguably a reasonable reading of section 254(a)(8). Such an interpretation also serves the purpose of assuring that HAVA grant funds do not supplant local funds. If the state MOE requirement does not pass through to localities when they expend HAVA funds, then states can replace local funding with federal funds and decrease total expenditures, thus thwarting the underlying purpose of an MOE requirement.

The second argument relates to the application of the Office of Management and Budget (OMB) Circular A-102 (the Common Rule), which imposes certain government-wide requirements on federal agencies that provide grants and cooperative agreements with state and local governments. This circular requires federal agencies<sup>16</sup> to adopt a grants management common rule so that the management of grants and cooperative agreements with state and local governments is consistent and uniform among federal agencies. If the provisions of a specific grant program prescribe policies or requirements that differ from those in OMB Circular A-102, the provisions of the particular grant program will govern.

When states distribute HAVA funds under section 251 to counties or units of local government the Common Rule requires that the state MOE requirement pass through to the sub-grantees. The requirement that subgrants include federal requirements imposed on primary grantees is articulated in 41 C.F.R. § 105-71.137(a):

States shall

- (1) ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;
- (2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;...

Since federal requirements imposed on the primary grantee pass through to the sub-grantee, a strong argument may be made that the state MOE requirement must be adhered to by localities that receive a grant under title II of HAVA. Monitoring and documentation responsibilities remain with the primary grantee and are subject to audit by the EAC.

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<sup>15</sup> 42 U.S.C. §§ 15404(a)(7) and (a)(8).

<sup>16</sup> See 5 U.S.C. § 105.